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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RONNIE LEE COLE,<br><br>Defendant and Appellant. | B228216<br><br>(Los Angeles County<br>Super. Ct. No. PA065186) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Martin R. Gladstein, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Elizabeth Garfinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Linda C. Johnson, and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

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Ronnie Lee Cole appeals from the judgment entered following his conviction by a jury for selling cocaine base. Cole contends the trial court erred by admitting unduly prejudicial evidence he had previously sold rock cocaine; failing to instruct the jury copurchasers may not be found guilty of selling a controlled substance and on accomplice liability; and preventing him from referring to the Rampart police corruption scandal during closing argument.[1] We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

In an information filed September 24, 2009 Cole was charged with the sale of a controlled substance (cocaine base) in violation of Health and Safety Code section 11352, subdivision (a).[2] The information specially alleged Cole had served eight prior prison terms within the meaning of Penal Code section 667.5, subdivision (b), and had suffered four prior drug-related convictions within the meaning of Health and Safety Code section 11370.2, subdivision (a). In addition, it was specially alleged Cole had suffered a prior serious or violent felony conviction within the meaning of the "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

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1 Pursuant to *People v. Mooc* (2001) 26 Cal.4th 1216, Cole has requested we examine the transcript of the in camera hearing conducted by the trial court and the documents it reviewed after the court determined Cole had demonstrated good cause to discover information in the arresting officer's personnel and administrative records pertaining to allegations of dishonesty. (See Evid. Code, §§ 1043, 1045; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) We have reviewed the sealed record of the proceedings, which adequately describes the documents the court reviewed, and conclude the trial court satisfied the minimum requirements in determining whether there was discoverable information; no abuse of discretion occurred. (*Mooc*, at p. 1229.)

2 Health and Safety Code section 11352, subdivision (a), provides, "[E]very person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport (1) any controlled substance specified" in other sections of the code, "shall be punished by imprisonment . . . for three, four, or five years."

2. *The Trial Court's Ruling Uncharged Acts of Misconduct Were Admissible*

On the first day of trial Cole moved to bifurcate trial of the special allegations regarding his prior convictions and requested, in the event he testified, any mention of his prior convictions be sanitized to exclude reference to drug-related activity because of the potential for prejudice (*People v. Beagle* (1972) 6 Cal.3d 441). Advising the court they intended to introduce evidence of Cole's prior convictions under Evidence Code section 1101, subdivision (b), to prove a fact other than disposition to commit the charged offense, the People argued, "It's the same pattern of activity where he's approached by an undercover officer and either Mr. Cole initiates a contact or the officer initiates the contact and is asked about . . . drugs, the exchange between the money and the drugs has occurred, and then he subsequently gets arrested for that activity."

Defense counsel reiterated it would be unduly prejudicial to admit "priors that are identical or very much similar to the charge that [the defendant] is facing" and argued "there's a very subtle issue here as to . . . what was Mr. Cole's intent on this occasion." The court asked, "Well, if that in fact is the issue, is his intent, aren't those prior convictions of virtually identical charges telling us his intent in the present case?" Defense counsel responded, "Well, I just don't think it's fair to . . . extrapolate because he had prior convictions similar to count 1 here, that that can somehow bootstrap the People's burden of showing that he had intent on this occasion."

The court ruled four of Cole's prior convictions for violating Health and Safety Code section 11352 were admissible and found, "I don't believe they are more prejudicial than probative, especially if intent is going to be the subject of your defense."

3. *Summary of the Evidence Presented at Trial*

a. *The transaction leading to Cole's arrest*

Los Angeles Police Officer Rene Barga testified he was working undercover with a team of officers engaged in making street-level drug arrests near Sepulveda Boulevard and Parthenia Street on August 7, 2009. As Cole rode by on his bicycle, Barga asked him if he knew where Barga could "get a 20," street vernacular for $20 worth of narcotics.

Cole replied, "Yeah, I'm trying to look for a 10 myself. . . . I'm looking for Garro . . . . He's my hookup."

Cole and Officer Barga walked around the area looking for "Garro," who was later identified as Baudilio Miranda. As they approached Columbus Street, Barga told Cole he would no longer follow him. Cole replied, "Give me the money and I'll go find him." After Barga gave Cole a recorded $20 bill, he asked Cole to leave his bicycle as collateral. Cole agreed, walked a few feet away, whistled to Miranda, who was nearby on a bicycle, and waved for him to come over. Cole told Barga, "That's Garro now." From a distance of three to five feet, Barga observed Cole give Miranda the $20 bill. Barga did not see whether Cole gave him any additional money. Miranda rode away.

Miranda returned 20 minutes later, slowing down to hand Cole a small plastic package containing an off-white, rock-like substance.[3] Cole said, "Look, he hooked it up, it's more than 20. . . . [G]o ahead and chip off a piece." After Officer Barga told him, "You do it," Cole broke off a piece, which he kept, thanked Barga and left. Cole was then arrested about 20 feet away. Officers found two glass pipes in his shoes, but did not find the piece he had chipped off.

Los Angeles Police Officer Robert Jamarillo, who was part of the undercover narcotics team, testified he observed an exchange between Miranda and Lorenzo Sanchez after Miranda had obtained the money from Cole and left to get the rock cocaine. Officers recovered one $10 bill, eighteen $20 bills, including the recorded $20 bill, and other denominations totaling $1,204 from Sanchez.[4]

b. *Evidence of uncharged acts of misconduct*

The People introduced evidence of three prior acts of misconduct by Cole. First, Los Angeles Police Officer Hector Diaz testified he was working undercover on October 29, 2005 when he saw Cole in a parking lot on Sepulveda Boulevard near Parthenia Street. After Diaz observed Cole engage in a hand-to-hand transaction, Diaz

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3 Test results showed the substance contained cocaine base.

4 Miranda and Lorenzo Sanchez were also arrested. They were not tried with Cole.

asked him if he "had a 20." Cole said yes, took the money and left his bicycle as collateral. Cole returned a few minutes later and handed Diaz what was later determined to be rock cocaine. Cole asked "for a chip," and Diaz gave him one. Diaz testified it was common to do so because "it's kind of like rewarding. You're paying him for helping you purchase narcotics."

Los Angeles Police Officer Andres Alegria testified he was driving an undercover vehicle near Sepulveda Boulevard and Parthenia Street on April 22, 1986 when Cole motioned him to pull over his car. Cole approached the car window and asked Alegria if he was "looking for a quarter" ($25 worth of rock cocaine). After Alegria responded yes, Cole said "it was hot in the area, that he would come back and knew where he could go get the narcotic or the cocaine for me." Cole then went into a building, returned with another individual, made an exchange with the other person and returned to Alegria's car. Alegria gave Cole $25, and Cole gave him a piece of rock cocaine.

Los Angeles Police Detective Rocky Sherwood testified he was driving an undercover car near Sepulveda and Parthenia on January 11, 1991 when he made eye contact with Cole, who was standing on the sidewalk. Cole affirmatively nodded his head, "which is a non-verbal communication that . . . he's working," so Sherwood slowed down. After directing Sherwood to pull over, Cole approached the car window and asked Sherwood "how much [he] needed." Sherwood said he was looking for a "40 rock." Cole responded he "would set [him] up with a fat 40" and walked toward two other men. All the men returned to the car. Cole got in the passenger side, while one man stood at the passenger window and the third man stood behind the car. The man standing at the window opened his hand, displaying two white rocks that resembled rock cocaine; Sherwood handed him $40. Cole was arrested while he was sitting in Sherwood's car.

c. *The defense's closing argument*

Cole did not testify or present any other evidence in his defense. In closing argument defense counsel proposed the theory "Cole really wasn't out to sell anything to anybody that day. He was looking for a supplier of his own. And fortunately, or unfortunately for him, he found somebody." Emphasizing that the jury is required to acquit a criminal defendant if it finds the evidence susceptible of two reasonable interpretations, one of which favors guilt and the other innocence, Cole's counsel argued, "The interesting thing about this that supports the fact that he was looking out for drugs is the fact that he had two coke pipes; one in each shoe. And he was simply out there to get some drugs to supply his addiction, which is causing him a lot of trouble throughout his life." Counsel also suggested the $10 bill recovered from Sanchez had come from Cole and was used to pay for the piece he had chipped off.

Defense counsel also challenged the sufficiency of the evidence on other elements of the charged offense and questioned whether there was sufficient chain of custody established between the time Officer Barga took the rock cocaine from Cole and the lab technician removed it from an envelope at the police lab. Counsel attempted to raise the Rampart Division/CRASH unit police scandal in which officers had testified falsely and fabricated evidence, but the prosecutor's objection to his argument was sustained.

4. *The Jury Instructions*

The jury was instructed, to find Cole guilty of violating section Health and Safety Code section 11352, subdivision (a), the People had to prove beyond a reasonable doubt (1) Cole "sold, furnished, gave away, or transported a controlled substance"; (2) Cole knew of its presence; (3) Cole knew of the substance's nature or character as a controlled substance; (4) the controlled substance was cocaine base; and (5) the controlled substance was in a useable amount.

With respect to the evidence of the uncharged acts of misconduct, the jury was instructed, "If you decide the defendant committed the uncharged offenses, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not the defendant had a plan or scheme to commit the offense alleged in this case. In

evaluating this evidence, consider the similarity, or lack of similarity between the uncharged offense and the charged offense. Do not consider this evidence for any other purpose. Do not conclude from this evidence that the defendant had a bad character or is disposed to commit the crime."

5. *The Jury's Verdict and Sentencing*

The jury found Cole guilty of selling cocaine base. In a bifurcated bench trial the court found true the prior conviction allegations. The court sentenced Cole to an aggregate state prison term of 17 years, consisting of the upper term of five years for selling cocaine base, plus two three-year enhancements pursuant to Health and Safety Code section 11370.2, subdivision (a), plus six years for the prior prison term enhancements pursuant to Penal Code section 667.5, subdivision (a). The court granted Cole's motion to dismiss the prior strike conviction (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 529-530) and struck the two remaining Health and Safety Code section 11370.2, subdivision (a), allegations.

## DISCUSSION

1. *The Trial Court Did Not Abuse Its Discretion in Admitting Evidence of Cole's Prior Drug Sales*

a. *General principles governing evidence of uncharged misconduct*

California law has long precluded use of evidence of a person's character (a predisposition or propensity to engage in a particular type of behavior) as a basis for an inference that he or she acted in conformity with that character on a particular occasion: Evidence Code section 1101, subdivision (a),[5] "prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393 (*Ewoldt*).) Indeed, "'[t]he rule excluding

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5 Evidence Code section 1101, subdivision (a), provides, "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

evidence of criminal propensity is nearly three centuries old in the common law.'" (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.)

Evidence Code section 1101, subdivision (b),[6] clarifies, however, that this rule "does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*Ewoldt, supra,* 7 Cal.4th at p. 393; see *Falsetta, supra,* 21 Cal.4th at p. 914 ["the rule against admitting evidence of the defendant's other bad acts to prove his present conduct was subject to far-ranging exceptions," citing Evid. Code, § 1101, subd. (b)].) "'[E]vidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes [citation] . . . only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent.'" (*People v. Carter* (2005) 36 Cal.4th 1114, 1147.) "As Evidence Code section 1101, subdivision (b) recognizes, that a defendant previously committed a similar crime can be circumstantial evidence tending to prove his identity, intent, and motive in the present crime. Like other circumstantial evidence, admissibility depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact, and the existence *vel non* of some other rule requiring exclusion." (*People v. Roldan* (2005) 35 Cal.4th 646, 705, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390; see also *People v. Walker* (2006) 139 Cal.App.4th 782, 796.)[7]

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6 Evidence Code section 1101, subdivision (b), provides, "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

7 The least degree of similarity between the uncharged act and the charged offense is required to prove intent. (*Ewoldt, supra,* 7 Cal.4th at p. 402.) "A greater degree of

In addition to its relevance to an issue other than predisposition or propensity, to be admissible under Evidence Code section 1101, subdivision (b), the probative value of the evidence of uncharged crimes "must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Kipp* (1998) 18 Cal.4th 349, 371; accord, *People v. Carter, supra*, 36 Cal.4th at p. 1149.) A trial court's determination of the admissibility of evidence of uncharged offenses is generally reviewed for an abuse of discretion. (*Kipp*, at p. 369 ["[o]n appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion"]; *Carter*, at p. 1149.)

b. *Evidence of Cole's acts of uncharged misconduct was properly admitted to establish a common design or plan and was not more prejudicial than probative*

Noting the trial court is obligated to examine the "precise elements of similarity between the offenses with respect to the issue" for which the evidence of uncharged misconduct has been introduced (*People v. Thompson* (1980) 27 Cal.3d 303, 316), Cole argues the court erred by generally reviewing similarity on the issue of intent while permitting the evidence to be used, according to the court's instructions, on the issue of common plan or design. (See also *Ewoldt*, *supra*, 7 Cal.4th at p. 404 [admission of prior acts evidence "'requires extremely careful analysis'"].) Cole also argues, even if the jury

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similarity is required in order to prove the existence of a common design or plan. . . . [I]n establishing a common design or plan, evidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'. . . [¶] To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*Id.* at pp. 402-403.) The greatest degree of similarity between the prior act and the charged offense is required when the evidence is offered to prove identity. (See *id.* at p. 403 [for prior crimes to be relevant to identity, "'[t]he pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature'"].)

had been instructed the evidence was admitted to establish intent, it was nevertheless error to allow it for that purpose because Health and Safety Code section 1152 is a general intent crime (*People v. Daniels* (1975) 14 Cal.3d 857, 861), and such evidence is admissible only if intent comprises an element of the charged offense. (*Ewoldt*, at p. 394, fn. 2.)

As the *Ewoldt* Court observed, there is a "subtle but significant" difference "between the use of evidence of uncharged acts to establish the existence of a common design or plan as opposed to the use of such evidence to prove intent . . . ." (*Ewoldt, supra,* 7 Cal.4th at p. 394, fn. 2.) "'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.' [Citation.] For example, in a prosecution for shoplifting in which it was conceded or assumed that the defendant left the store without paying for certain merchandise, the defendant's uncharged similar acts of theft might be admitted to demonstrate that he or she did not inadvertently neglect to pay for the merchandise, but rather harbored the intent to steal it. [¶] Evidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged. Unlike evidence used to prove intent, where the act is conceded or assumed, '[i]n proving design, the act is still undetermined . . . .'" (*Ibid.*)

In the instant case the court and counsel were imprecise in discussing the basis for admitting the uncharged misconduct evidence, obscuring this subtle distinction. The prosecutor initially argued the evidence should be admitted because "it's the same pattern of activity," an unmistakable reference to a common plan or design. It was defense counsel who then injected "intent" into the discussion when he argued, "[t]here's a subtle issue here as to . . . what was Mr. Cole's intent on this occasion." The court then adopted defense counsel's terminology although it and the lawyers were plainly concerned with Cole's defense that, notwithstanding his participation in the transaction, he had neither sold nor facilitated the sale of the rock cocaine.[8] The fact the jury was instructed without

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8 In his opening statement defense counsel continued his mistaken reference to intent: "[Cole] was looking to supply his own addiction. The officer will testify, you can listen to his testimony. The officers essentially twisted the facts around to drag him into

objection that the evidence was admitted for the purpose of deciding whether Cole had a plan or scheme to commit the offense reinforces the conclusion the court and counsel all understood the appropriate purpose for which the evidence was offered.

Contrary to Cole's contention, the trial court did not abuse its discretion in determining the prior acts "share[d] sufficient common features with the charged offense[] to support the inference that both the uncharged misconduct and the charged offense[] [were] manifestations of a common design or plan," not a "series of similar spontaneous acts." (*Ewoldt, supra,* 7 Cal.4th at p. 403.) Common to the three uncharged acts and the instant offense, Cole was at the intersection of Sepulveda Boulevard and Parthenia Street acting as a middleman or "hook" by making the initial contact, agreeing to sell or furnish rock cocaine and obtaining the rock cocaine from a third party in another location. "Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense." (*Ibid*.; see *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1225 ["even with respect to the comparatively higher degree of similarity required for the use of other-crimes evidence to establish 'common scheme or plan,' the standard can be met despite the existence of some factual differences between or among the charged offenses"].)

Finally, the trial court did not abuse its broad discretion in determining the evidence was more probative than prejudicial. "The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in

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being a transporter or seller of rock cocaine. He could not sell any rock cocaine, ladies and gentlemen, because he had none on him. He was looking to get rock cocaine himself to supply his addiction. . . . And the intent issue is something that I can ask you to focus on in this case. . . . And that's essentially the defense contention in this case. It's a very simple case. It's going to involve around the intent."

Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.'" (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Here, the prejudice to Cole resulted not from some policy concern or danger that the evidence could be misconstrued or might evoke an emotional bias against Cole unrelated to the issues; to the contrary, the prejudice resulted from its persuasiveness.

c. *Any error in admitting the evidence was harmless*

Even if the trial court had erred in admitting evidence of Cole's prior acts of misconduct, the error was harmless under *People v. Watson* (1956) 46 Cal.2d 818, the standard of review governing the erroneous admission of evidence. (See *People v. Malone* (1988) 47 Cal.3d 1, 22; *People v. Lopez* (2011) 198 Cal.App.4th 698.)

The evidence of Cole's guilt was compelling. He agreed to help Officer Barga obtain $20 worth of rock cocaine; he took Barga's money and gave it to Miranda, who then engaged in a hand-to-hand transaction with Sanchez at another location. Miranda returned with the rock cocaine and gave it to Cole, who then gave it to Barga. Cole argues this evidence did not necessarily mean he sold or intended to sell drugs. He contends no physical evidence supports the testimony he received a piece of the rock cocaine in exchange for his help because the chip was not recovered and argues it would not invariably be evidence of a sale in any event.

Cole interprets the elements of the offense too narrowly. Health and Safety Code section 11352 is violated not just by the sale of a controlled substance but by furnishing, transporting or giving it away. "Furnish," as used in Health and Safety Code 11352, "means to supply by any means, by sale or otherwise." (Health & Saf. Code, § 11016 [furnish has same meaning as provided in Bus. & Prof. Code § 4048.5; that section repealed and provisions now found at Bus. & Prof. Code § 4026]; cf. *People v. Cornejo* (1979) 92 Cal.App.3d 637, 660 [Health & Saf. Code § 11352 "does not require *sale* of heroin for its commission"; sufficient that defendant acting as a middleman provided officer with sample of heroin].) Whether or not compensated with his own chip, overwhelming evidence established Cole supplied Barga with rock cocaine.

2. *There Was No Instructional Error*

a. *Law generally*

In a criminal case the trial court must instruct on the general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case. (*People v. Martinez* (2010) 47 Cal.4th 911, 953; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) This obligation includes the duty to give instructions on any affirmative defense for which the record contains substantial evidence. (*People v. Salas* (2006) 37 Cal.4th 967, 982; see *People v. Watson* (2000) 22 Cal.4th 220, 222 ["trial court was required to instruct the second jury on the defense of entrapment if, but only if, substantial evidence supported the defense"]; *In re Christian S.* (1994) 7 Cal.4th 768, 783 ["'[a] trial court need give a requested instruction concerning a defense *only if there is substantial evidence to support the defense* '"].) "Evidence is 'substantial' only if a reasonable jury could find it persuasive." (*People v. Young* (2005) 34 Cal.4th 1149, 1200.) The trial court need not give instructions based solely on conjecture and speculation, but may not assess the credibility of the evidence in making the determination whether an instruction should be given. (*Ibid.*)

We review de novo a claim the trial court failed to give a required instruction. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.) "Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that, we believe, is however predominantly legal." (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

b. *The trial court did not have a duty to instruct the jury a copurchaser cannot be found guilty of selling drugs*

Relying on *People v. Edwards* (1985) 39 Cal.3d 107, 117 (*Edwards*) Cole contends the trial court should have instructed the jury he could not be convicted of furnishing rock cocaine to Barga if he and the officer were merely "copurchasers" of the controlled substance. In *Edwards* the defendant's girlfriend had accidentally overdosed on heroin the two of them had purchased together using joint funds and then consumed together. In reversing the convictions for furnishing a controlled substance and felony

murder because "the trial court erred in failing to instruct the jury that defendant was not guilty of furnishing [drugs] if he and [his girlfriend] were copurchasers," the Supreme Court observed, "We expect there will be few cases involving a copurchase by truly equal partners. Where one of the copurchasers takes a more active role in instigating, financing, arranging or carrying-out the drug transaction, the 'partnership' is not an equal one and the more active 'partner' may be guilty of furnishing to the less active one. Furthermore, one who acts as a go-between or agent of either the buyer or seller clearly may be found guilty of furnishing as an aider and abettor to the seller." (*Id.* at pp. 110, fn. 5; see also *People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1584; *People v. Mayfield* (1964) 225 Cal.App.2d 263, 266-267.)

Even crediting Cole's claim he had contributed $10 to the purchase of the rock cocaine (a contention not supported by any evidence at trial), the instant case does not present the rare circumstance warranting a copurchaser instruction. Cole clearly took a more active role in carrying out the drug transaction: Cole found Garro, gave him the money while standing several feet away from Barga and was given the rock cocaine to then distribute to Barga. Also unlike *Edwards*, Barga and Cole did not consume, nor was there any plan to consume, the drugs together. (See *Edwards, supra,* 39 Cal.3d at p. 114 ["there was substantial evidence from which the jury could have concluded that . . . [defendant and decedent] were equal partners in the decision to make the purchase and in its consummation, as well"].) Because Barga and Cole were not "truly equal partners" (*id.* at p. 114, fn. 5), no copurchaser instruction was required.[9]

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9 Quoting *People v. Breverman, supra,* 19 Cal.4th 142, Cole contends the trial court had a sua sponte duty to give a copurchaser instruction because his closing argument put the court on notice he was relying on that defense. (*Id.* at p. 157 ["a sua sponte instructional duty arises 'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense *and* the defense is not inconsistent with the defendant's theory of the case'"].) The *Breverman* Court, however, was distinguishing between the obligation to instruct on defenses and lesser included offenses and explaining the trial court had no such duty if the defense, . . . was inconsistent with a defendant's theory of the case. It was not suggesting a party is entitled to instruction on a defense merely because he or she relies on it even if not

c. *The trial court was not required to instruct the jury on aiding and abetting liability*

Badly misconstruing the breadth of Health and Safety Code section 11352, subdivision (a), which, as discussed, prohibits not only selling a controlled substance but also furnishing it or even giving it away, Cole contends he could only be found guilty of the charged offense on the theory he had aided and abetted Miranda's sale of the rock cocaine to Officer Barga, not that he was the perpetrator of the crime. Based on that flawed premise, he then argues the court's failure to instruct on the specific intent required for accomplice liability was prejudicial error. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1118 [to prove a defendant is an aider and abettor, "the prosecution must show that the defendant acted 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose of either committing, or of encouraging of facilitating commission of, the offense'"].)

Cole was not prosecuted for aiding and abetting Miranda's sale, but for his own role as a middleman in selling or furnishing the rock cocaine to Officer Barga. Because the People did not rely on a theory of accomplice liability, the court had no obligation to instruct on it. (See Bench Note to CALCRIM No. 401 (2012 ed.) p. 170 [court has a sua sponte duty to instruct on aiding and abetting if "the prosecution relies on it as a theory of culpability," citing *People v. Beeman* (1984) 35 Cal.3d 547, 560-561]; see *People v. Sassounian* (1986) 182 Cal.App.3d 361, 404 [no sua sponte instruction on aiding and abetting required when "defendant was not tried as an aider and abettor, there was no evidence to support such a theory and neither side argued that theory to the jury"].)

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supported by substantial evidence. (See *People v. Memro* (1995) 11 Cal.4th 786, 868 ["party is not entitled to an instruction on a theory for which there is no supporting evidence"]; *In re Christian S.*, *supra*, 7 Cal.4th at p. 783.)

3. *The Trial Court Did Not Abuse Its Discretion in Preventing Cole from Raising the Rampart Police Corruption Scandal During Closing Argument*

"[A] criminal defendant has a constitutional right to have counsel present closing argument to the trier of fact." (*People v. Rodgrigues* (1994) 8 Cal.4th 1060, 1184.) Counsel should generally be allowed wide latitude in closing argument (*People v. Farmer* (1989) 47 Cal.3d 888, 922, disapproved on another ground in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6) and may refer to evidence and judicially noticed facts, matters of common knowledge, and illustrations from experience, history or literature, but may not focus on the particular facts of unrelated cases. (*Ibid.*) The trial court has broad discretion to control the scope of closing argument. (*Rodrigues*, at p. 1184.)

Cole contends the trial court abused its discretion in prohibiting defense counsel from raising the Rampart police corruption scandal during closing argument, insisting the ruling completely foreclosed his most persuasive argument challenging the People's proof of the chain of custody for the rock cocaine he allegedly furnished to Officer Barga. Cole argues the testimony only established Officer Barga took the rock cocaine from him, it was booked it into evidence by someone under an identification number, and then a lab technician later removed an envelope from the police lab bearing the same identification number; it did not establish how the rock cocaine got from Barga to the evidence envelope opened by the lab technician or who may have touched the evidence in the interim.[10]

Even if the Rampart police corruption scandal now falls within the "common knowledge" exception, the trial court properly exercised its discretion in preventing reference to it. Arguments based on the facts of a different case offered out of context may mislead the jury. (See *People v. Marshall* (1996) 13 Cal.4th 799, 854.) Counsel may not confuse the jury with hearsay in the form of "irrelevant facts" about "unrelated

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10 The record does not establish Barga did not book the cocaine into evidence. Barga was asked, "What did you do with the bindle that you had received from the defendant?" He responded, "It was booked into evidence."

specific crimes." (See *People v. London* (1988) 206 Cal.App.3d 896, 909; *People v. Mendoza* (1974) 37 Cal.App.3d 717, 725.)

Moreover, defense counsel was permitted to argue his essential point, stating, "And we don't know how many people handled [the drugs] or whether they might have been tampered with or not." (Cf. *People v. Marshall, supra,* 13 Cal.4th at p. 855 [no abuse of discretion when "counsel was granted latitude to argue, as he sought, that this case lacked the cruelty and callousness found in other murder cases"].) Indeed, Cole's argument on chain of custody was not that Officer Barga lied about booking the rock cocaine into evidence (presumably using the Rampart scandal to illustrate that police officers may lie), but that no one testified who had booked it into evidence; that is, the People "did not establish [chain of custody] to the satisfaction you need beyond a reasonable doubt." The trial court's ruling appropriately ensured defense counsel's argument did not "stray unduly from the mark." (*Marshall,* at p. 855.)

**DISPOSITION**

The judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.